UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

J.Y., a minor child, by and through her permanent guardian, FREDDIE EDWARDS,

Plaintiff,

vs. CASE NO.: 18-CV-00246-MW-GRJ

PARTNERSHIP FOR STRONG FAMILIES, INC., a Florida non-profit corporation, FAMILY PRESERVATION SERVICES OF FLORIDA, INC., BRITTNEY MOREAU, individually, and JUDITH KING, individually,

Defendants.
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PLAINTIFF'S RESPONSE TO MOTION TO DISMISS BY PARNTERSHIP FOR STRONG FAMILIES, INC.

Plaintiff, J.Y., a minor child, by and through her legal guardian, Freddie Edwards, (hereinafter "Plaintiff" or "J.Y.") hereby responds to the Motion to Dismiss Plaintiff's Complaint with Prejudice (Doc. 13), filed by Partnership for Strong Families, Inc. ("PSF"), as follows:

I. UNDISPUTED FACTS:

For purposes of PSF's motion to dismiss, the facts alleged in Plaintiff's Complaint must be accepted as true and construed in the light most favorable to Plaintiff. *Pereda v. Brookdale Senior Living Communities, Inc.*, 666 F.3d 1269,

1272 (11th Cir. 2012). Although PSF purports to acknowledge this, throughout its motion PSF disputes those facts, calling them "unmeritorious" or "incorrect." PSF then suggests that it had no involvement with J.Y. when her father sexually abused her. In so claiming, PSF ignores the fact that for over 11 years, since J.Y. was an infant, it was PSF and Defendants who took custody of J.Y, placed her with abusive relatives, and failed to investigate, supervise, and protect her. It was PSF and Defendants who then placed her with an absent, abusive, criminal father whom J.Y. had never lived with, and whose whereabouts were unknown other than when he was in jail, and with whom the circuit court had previously directed J.Y. to have no contact. Given PSF's skewing of the facts alleged in the Complaint, they are set forth here more accurately:

J.Y. was born in 2003 in Alachua County and since the time she was two months old she has been involuntarily placed in the legal and physical custody of the Florida Department of Children and Families ("DCF"). Doc. 1, ¶¶ 7, 24.

PSF was the lead agency for community-based care in Alachua County and contracted with DCF to provide foster care and related services to children in state custody, including J.Y. PSF subcontracted out the provision of case management services in Alachua County to Family Preservation Services of Florida, Inc. ("FPS"). PSF was required to monitor FPS's performance regarding the provision of those services to ensure compliance with all state and federal laws, DCF Operating

Procedures, PSF and FPS Policies and Procedures, and the common law, in order to ensure the health, welfare and safety of children in the State's custody, including J.Y. Doc. 1, ¶¶ 10-15, 17.

Defendants Judith King ("King") and Brittney Moreau ("Moreau") were employed by PSF and/or FPS as case workers, case managers, and/or family care counselors, and were obligated to comply with all relevant laws. Doc. 1, ¶¶ 18-20 An apparent agency relationship existed between PSF and FPS wherein employees of these agencies, including King and Moreau, held themselves out to be employees of PSF. Doc. 1, ¶¶ 22-23.

J.Y. first entered the DCF system as an infant. J.Y.'s mother abused, neglected, and abandoned J.Y. early in her life. J.Y.'s father, George Young IV ("George Young" or "father") abandoned her since birth, making no significant contribution to her care or maintenance and failing to establish or maintain any substantial and positive relationship with her. Defendants first took J.Y. into custody away from her mother in 2003 and temporarily sheltered with her mother's cousin, Monica Walker. In May 2008, after J.Y.'s mother was arrested, Defendants removed J.Y. and again sheltered and placed her with Monica Walker. Doc. 1, ¶¶ 25-28.

At a court hearing in October 2008, it was noted that J.Y.'s mother was not compliant with her case plan and was incarcerated. J.Y.'s father, George Young,

had been in Broward County jail for possession of cannabis, resisting arrest without violence, and driving with a suspended license, and was recently released. The court directed that George Young was not to have any contact with J.Y. without further order of the court. J.Y. was placed in Monica Walker's permanent custody and protective supervision was terminated in November 2008. Doc. 1, ¶¶ 35-37.

During J.Y.'s placement with Monica Walker, J.Y. was continuously exposed to physical abuse, substance exposure, failure to protect, and domestic violence between Monica Walker and her paramour, Darryl White, and Darryl White sexually abused J.Y. In September 2013 the child abuse hotline received a report that Monica Walker had been physically abusing J.Y. In October 2013, Defendants removed J.Y. from Monica Walker's custody and placed her with her maternal aunt, Lashay Walker. Doc. 1, ¶¶ 38-41.

From the time J.Y. was removed from her mother's care in 2008 and placed under Defendants' protective supervision, PFS and FPS did not know the whereabouts of J.Y.'s father, George Young, despite diligent searches (except that Defendants knew in 2008 that George Young had been imprisoned). During that time George Young still made no significant contribution to J.Y.'s care and maintenance and had no substantial and positive relationship with her. Doc. 1, ¶¶ 42-43.

Nonetheless, in January 2014, George Young appeared at a status conference and requested custody of J.Y. He reported that J.Y. had lived with him for a short period of time in 2006 and that he recently had frequent contact with her, including an extended weekend visit in his home. Defendants were unaware of J.Y.'s unsupervised visits with George Young, most of which occurred after the circuit court had prohibited any contact between J.Y. and George Young. Yet PFS, FPS and Moreau recommended that George Young have supervised visits with J.Y. and that Moreau would complete an expedited home study on him. Doc. 1, ¶¶ 44-45.

Between January and April 2014, George Young had only three supervised visits with J.Y. Nonetheless, Dr. Mary McCue, (the therapist provided to J.Y. by Defendants), recommended that George Young have unsupervised visits with J.Y. Defendants never advised Dr. McCue of George Young's lengthy criminal history, which included several arrests and convictions for cocaine possession, aggravated battery with a firearm, shooting into an occupied vehicle, battery, resisting arrest, grand theft, robbery with a deadly weapon, possession of cannabis, felony battery with prior conviction, assault, domestic violence. Nor did they advise the doctor that George Young had been in and out of prison beginning in 1990 through 2011, and that his most recent arrest was in 2012 was for aggravated battery with a deadly weapon/domestic violence. Doc. 1, ¶¶ 46, 48, 53, 59.

Defendants subsequently recommended that George Young be granted full reunification with J.Y. At no time did Defendants ever notify the General Magistrate of George Young's lengthy and violent criminal history. Without having full and complete information from Defendants, in April 2014, the General Magistrate recommended that J.Y. be placed in George Young's temporary custody, under Defendants' protective supervision, and in George Young's permanent custody upon an approved home study. The circuit court adopted that recommendation. J.Y. was 10 years old in April 2014 when Defendants placed her with her father, and Defendants knew that J.Y. had already been the victim of sexual, emotional, and physical abuse by the people with whom Defendants had placed her. Doc. 1, ¶¶ 47-53, 68, 79.

At a May 2014 status conference it was determined that J.Y. would be placed in her father's custody following a completed safety plan and Defendants recommended that protective supervision of J.Y. then be terminated. At no time did Defendants advise the General Magistrate or the court of George Young's criminal history which included, among other things, domestic violence. In May 2014, the General Magistrate recommended that protective supervision for J.Y. be terminated in June 2014, which the circuit court approved. Doc. 1, ¶¶ 52-56.

Defendants never developed a reunification case plan for George Young to ensure that he, who had an extensive criminal history and who had abandoned J.Y.

since birth, would have the parenting and other skills necessary to provide J.Y. with a safe, healthy and stable home. Defendants did not provide George Young with any specialized services to address the history, needs and risk factors of a child such as J.Y. who had been sexually abused. Defendants did not provide for a safety management plan during the reunification process in order to determine whether George Young's protective capacities were adequate. Nor did Defendants ensure George Young was free from substance use and abuse before placing J.Y. with him. Defendants knew or should have known, based on their knowledge of J.Y.'s past sexual and physical abuse, that placing J.Y. with George Young would place her at risk of substantial harm based on his substance use, abuse, and violent criminal history. Doc. 1, ¶¶ 57-61, 68.

In March 2015, it was reported that J.Y.'s father, George Young, raped her, and had been doing so since January 2015. At a forensic interview J.Y disclosed that George Young would drink beer, smoke cannabis, and snort cocaine in her presence and would rape her and that it happened more than 10 times between October of 2014 through January 2015.[1] J.Y. was sheltered with and permanently

[1] The Complaint alleges that J.Y. reported that her father's sexual battery occurred from October 2014 to March 2015, but the police report from which this allegation is taken states that J.Y. said the abuse began when she first lived with George Young when she was 10 years old, which may have been during the time she was under PSF's protective supervision. If necessary, Plaintiff should be permitted to amend the Complaint to clarify this allegation.

placed with her maternal grandfather, Freddie Edwards, on March 4, 2015. Doc. 1, ¶¶ 62-66.

George Young was eventually charged with five (5) counts of capital sexual battery, was tried, convicted, and sentenced to life in prison. Doc. 1, ¶ 65. PSF's actions and inactions were part of a pattern and practice of failing to monitor its subcontracted providers, deliberately failing to learn of dangers that children in its custody were exposed to, and failing to require appropriate placement for children in its custody. Defendants' actions and inactions regarding J.Y. were taken with knowledge of the substantial risks to her, with deliberate indifference to those risks, and were a direct and proximate cause of her injuries. Doc. 1, ¶¶ 75-81.

II. PLAINTIFF'S §1983 CLAIM IS ADEQUATELY PLED AND PSF'S MOTION TO DISMISS IT WITH PREJUDICE MUST BE DENIED.

PSF's contention that Plaintiff's 42 U.S.C. § 1983 claim in Count I should be dismissed, with prejudice, is based upon a mistaken view of the law and the facts. PSF erroneously asserts that J.Y. had no constitutional right to be free from harm. PSF's arguments are also based on the flawed factual and legal premise that the harm J.Y. suffered did not occur when she was in Defendants' "custody." The law and the facts show otherwise and PSF's motion to dismiss the § 1983 claim must be denied. [2]

[2] Contrary to PSF's contention, (Doc. 31 at pp.7-8) Plaintiff pled a procedural due process claim under the Fourteenth Amendment. Doc. 13 at pp.7-8. Plaintiff

A. J.Y. has the Constitutional Right to be Safe and Free from Harm.

According to PSF, J.Y. has no constitutional right under the Fourteenth Amendment to be free from harm, calling such a right "plainly impracticable." Instead, PSF urges that freedom from harm is simply a "goal" of Florida's child protective system and therefore Plaintiff's § 1983 claim is not cognizable. Doc. 13 at p.21. This is plainly wrong. The "fundamental right to physical safety [is] protected by the Fourteenth Amendment." *Taylor By & Through Walker v. Ledbetter*, 818 F.2d 791, 794 (11th Cir. 1987); *see also Smith v. Beasley*, 775 F. Supp. 2d 1344, 1355 (M.D. Fla. 2011) (recognizing child's liberty interest in physical safety as a federal constitutional right).

As the Eleventh Circuit recognized in *Taylor*, in order to state a § 1983 claim based on this fundamental right, Plaintiff had to allege that Defendants' actions were a substantial factor leading to the violation of this constitutionally protected liberty interest, and that Defendants displayed deliberate indifference. *Taylor*, 818 F.2d at 794. Deliberate indifference occurs when Defendants were objectively aware of a risk of serious harm; recklessly disregarded the risk; and the conduct was more than

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alleges that Defendants failed to comply with state law in the performance of their duties, thereby stating a procedural due process claim. *See* Doc. 1 at ¶¶ 11, 15, 17-21, 67, 69, 75-82; *Taylor*, 818 F.2d at 798-99 (contention that defendants deprived plaintiff of rights under state statutes and regulations stated procedural due process claim). Because PSF's motion to dismiss focuses only on Plaintiff's substantive due process claim, this Response addresses only that portion of Plaintiff's § 1983 claim.

merely negligent. *H.A.L. v. Foltz*, 370 F.3d 1079, 1083 (11th Cir. 2004). Plaintiff has so alleged. Doc. 1 at ¶¶ 75-81.

B. PSF is Liable for the Abuse that J.Y. Suffered on PSF's Watch and as a Result of its Placements.

PSF also contends that it has no liability for the sexual abuse J.Y. suffered by her father because it occurred when she was not under PSF's custody or supervision. In PSF's view, the only type of "custody" that gives rise to a civil rights claim is when a child has been placed in foster care with non-relatives, which did not occur with J.Y. As such, PSF claims that the "non-custodial" standards set forth in *DeShaney* apply, rather than the "custodial" standards set forth in *Taylor* and its progeny. Doc. 13 at pp.9-20. This is another misreading of the law.

It is also factually inaccurate. J.Y. was under PSF's protective supervision when her mother's cousin, Monica Walker (with whom Defendants placed J.Y.) and her paramour abused J.Y. The abuse J.Y. suffered continued throughout her life until she was removed from her father in March 2015. Doc. 1 at ¶ 82. J.Y. was formally under Defendants' protective supervision in 2003, from May 2008 to November 2008, and from October 2013 to May 2014. Doc. 1 at ¶¶ 24, 27, 37, 41-56. Thus, the harm J.Y. suffered occurred during times that she was actively under PSF's supervision.[3] *See* § 39.01(71), Fla. Stat. (2018) (protective supervision is legal

[3] To the extent PSF disputes this fact, it is not resolvable on a motion to dismiss. *See Page v. Postmaster Gen. & Chief Exec. Officer of U.S. Postal Serv.*,

status in dependency cases which permits child to remain safely in his or her own home or other nonlicensed placement under supervision of department agent and which must be reviewed by court during period of supervision); § 39.01(35)(a)-(c), (j), Fla. Stat. ("harm" includes "allowing" infliction of physical, mental or emotional injury, sexual battery, sexual exploitation, and negligent failure to protect).

Even if Defendants can establish that the instances of physical and sexual abuse by Monica Walker, Darryl White, and George Young took place only during periods of time when active "protective supervision" had been terminated, J.Y. certainly suffered mental and emotional harm before and after those physical instances of abuse, while under PSF's supervision. Moreover, as discussed further *infra*, PSF is liable for all of the abuse J.Y. suffered because it placed J.Y. with her abusers and was deliberately indifferent to the risks and harms created by placing her with them and by failing to protect her from the risks it created.

As a legal matter, PSF is wrong to insist that J.Y.'s constitutional right to safety arose only if she had been placed in a foster home. Although *Taylor* arose in the context of a foster home situation, that is not the only type of "custodial"

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493 Fed. App'x 994, 995 (11th Cir. 2012). In addition, although the Complaint in its current form may not have made this clear, some of the sexual abuse J.Y. suffered by her father appears to have occurred when Defendants first placed her with George Young when she was 10 years old and under protective supervision. Although that fact is not dispositive, Plaintiff should be permitted to amend the Complaint to allege it more clearly if the Court deems it critical.

arrangement giving rise to a § 1983 claim. The *Taylor* court used an analogy to apply the constitutional right to safety to the circumstances in that case which are analogous to the circumstances here. *Taylor* found that foster care was analogous to commitment in an institution because in both instances, the child is involuntarily placed in a custodial environment and unable to seek alternative living arrangements. *Taylor*, 818 F.2d at 795. Such children have a substantive due process liberty interest in reasonably safe living conditions. The state's assumption of responsibility to find and keep the child in a safe environment placed an obligation on the state to insure the continuing safety of that environment. Failing to meet that obligation constituted a deprivation of the child's constitutional rights. *Id.*

In so holding, the *Taylor* court recognized that the risk to children in a foster care home is high enough to bring them under the umbrella of protection afforded by the fourteenth amendment because they are "isolated; no persons outside the home setting are present to witness and report mistreatment. The children are helpless. Without the investigation, supervision, and constant contact required by statute, a child placed in a foster home is at the mercy of the foster parents." *Id.* at 797. As the *Taylor* court observed, "it is time that the law give these defenseless children at least the same protection afforded adults who are imprisoned as a result of their own misdeeds." *Id.*

The same applies here. It was Defendants that removed J.Y. from her mother's custody when she was four years old, had her adjudicated dependent, placed her with another relative, put her under protective supervision, terminated protective supervision, then later removed her and placed her with yet another relative, and during that time she was physically abused by the cousin Defendants placed her with and sexually abused by the cousin's paramour. Defendants then actively participated in placing 10-year-old J.Y., whose care and custody they had been involved with since she was an infant, with a father who had abandoned her at birth, with whom she had never lived, without ever telling her therapist, the General Magistrate, or the court about his extensive criminal background. They made this placement even though the court had previously ordered George Young to have no contact with J.Y., and without ensuring he was capable of caring for a child who had been physically, emotionally, and sexually abused, and without adequately supervising that placement. George Young then repeatedly raped J.Y.

Both during Defendants' reckless and willfully deficient supervision and when Defendants terminated protective supervision, they left J.Y. helpless and at the mercy of abusive custodians with whom they placed her and J.Y. was unable to make her own alternative living arrangements, just as in *Taylor*. When Defendants assumed control for making J.Y.'s living arrangements, they assumed responsibility to ensure she was placed in a safe environment. Defendants failed to do so here. In

so doing, Defendants acted with deliberate indifference to J.Y.'s constitutional right to be safe and free from harm. As the *Taylor* court recognized, if the state puts a person "in a position of danger from private persons and then fails to protect him, it will not be heard to say that is role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *Id.* at 797.

The courts have recognized § 1983 claims in non-foster care situations. *See A.D. ex rel. McGhee v. Alabama Dep't of Human Res.*, 995 F. Supp. 2d 1253, 1270–71 (N.D. Ala. 2014) (court recognized § 1983 claim of child placed with custodians but not in foster care; analogizing case to *Taylor*, court noted that "[a]lthough A.D. is not a foster child in a foster home, she was, nonetheless, a child whose welfare was placed in the hands of the State and her placement with [the custodians] was involuntary."); *Rhodes-Courter ex rel. Courter v. Thompson*, 252 F. Supp. 2d 1359, 1363 (M.D. Fla. 2003) (child's § 1983 claim related to her placement with abusive grandfather before placement in foster care was properly pled). By contrast, PSF cites no authority holding a child's constitutional right to be safe does not arise in any other protective services context except foster care.

PSF's reliance on *DeShaney* is misplaced. In *DeShaney*, a child had been beaten by his father, with whom he lived his whole life and who had legal and physical custody. Although the state's social services agencies took some steps to protect him, they never removed the boy from the home, (other than temporarily for

3 days) and the father eventually permanently injured him. The state was not liable for that harm because although it returned the child to his father's custody, it had no part in placing him with his father in the first place. As the Supreme Court explained:

> While the State may have been aware of the dangers that [the child] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. . . . when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all . . . .

DeShaney v. Winnebago Cty. Dept. of Social Svcs., 489 U.S. 189, 201 (1989).

By contrast here, Defendants did not "return" J.Y. to a parent she had been living with her whole life. J.Y.'s father, George Young, abandoned her as an infant.[4] When Defendants removed J.Y. from her mother's care as a toddler, they placed her with a cousin, not with her father. J.Y. never lived with George Young during her first 10 years of life, and he had no physical custody of her until Defendants placed her with him. It was Defendants that placed J.Y. with the various people who abused her, including her father, and Defendants that failed to supervise and protect J.Y. during these placements which they "supervised" for at least seven and nine months, respectively. Defendants thereby played an instrumental part in creating the dangers

[4] "Abandonment" under Florida law occurs when a parent has "made no significant contribution to the child's care and maintenance or has failed to establish or maintain a substantial and positive relationship with the child, or both." § 39.01(1), Fla. Stat. (2018). Plaintiff has so alleged. Doc. 1 at ¶ 26.

to J.Y. and placing her in worse circumstances than she would have been in if they had not acted at all. Accordingly, this situation falls squarely within *Taylor*.

As the courts have explained, when the state removes a child from the care of a parent with whom she is living, it strips her of her liberty and renders her "utterly dependent on the beneficence of its employees and agents." *Omar ex rel. Cannon v. Lindsey*, 328 F. Supp. 2d 1287, 1293 (M.D. Fla. 2004). Such a seizure and sequestration gives rise to a constitutional duty to act as the child's fiduciary. *Id.* In *Omar*, as here, when the defendants facilitated the child's placement with someone who posed a clearly foreseeable risk to the child's well-being, they put the child in a place he would never have been but-for their intervention under color of state law. In such a circumstance, *DeShaney* does not apply. *Id.*

Although *Taylor* is the appropriate standard to apply here, J.Y.'s circumstances still fall within the *DeShaney* court's explanation for assessing liability -- when the state, through dependency or otherwise, takes a child into custody, "the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney*, 489 U.S. at 199-200. The rationale for this principle is "simple enough" -- when the state exercises its power to take over an individual's care but fails to provide for her basic human needs, including reasonable safety, "it transgresses the substantive limits on state action set by the . . . Due Process Clause." *Id.* "The affirmative duty to protect arises

not from the State's knowledge of the individual's predicament or from its expressions of intent to help [her], but from the limitation which it has imposed on his freedom to act on [her] own behalf." *Id.*; *see also Taylor*, 818 F.2d at 794-95.

Here, J.Y. was not able to care for herself or choose her caregivers; Defendants made those choices for her. They therefore assumed responsibility for the harm that she suffered when they placed her with abusive relatives and then a father with an extensive criminal history whom she had never lived with and by taking no actions to ensure she would be safe with him.

Also inapposite are the *Knight* and *Harris* opinions PSF cites. Doc. 13 at p.27. *Knight* involved an arrestee's claims against an arresting officer, which have no application here. *Knight v. Jacobson*, 300 F.3d 1272, 1276 (11th Cir. 2002). In *Harris*, although the court dismissed a claim against an employee who had no pre-adoption contact with the children who were abused, it refused to dismiss a claim against an employee who did have such contact and reports of abuse before the adoption. *Harris v. G.K.*, 187 So. 3d 871, 876 (Fla. 3d DCA 2016). By contrast all Defendants here had contact with J.Y., knowledge of the abuse against her, and knowledge of George Young's violent criminal history, before placing J.Y. with her father.

The fact that PSF might otherwise have had a "goal" of reuniting J.Y. with a "non-offending" natural parent did not take precedence over J.Y.'s constitutional

right to be free from harm. In the first place, PSF's characterization of George Young as a "non-offending" parent, because J.Y. had never been removed from his custody, is questionable at best. *See* Doc. 13 at p.24. The reason Defendants never removed J.Y. from George Young's custody is because he never lived with her or had custody of her to begin with until Defendants placed her with him at 10 years old. Moreover, the General Magistrate's decision to place J.Y. with her father was made without full and complete information, because Defendants failed to inform the Magistrate, J.Y.'s therapist, or the court about George Young's extensive criminal history.

Even if George Young was considered a "non-offending" parent, Defendants had an obligation to ensure that he was able to care for J.Y. appropriately and that placement with him would not endanger J.Y. *See, e.g., B.C. v. Dept. of Children & Families*, 864 So. 2d 486, 490 (Fla. 5th DCA 2004) (where child is dependent as to one parent, court can place child with a *fit and able* non-offending parent willing to take *unless* court finds that such placement would *endanger safety, well-being, or physical, mental, or emotional health of child*). There is certainly at least a factual dispute, not resolvable on a motion to dismiss, about whether any of these recommendations and approvals by the therapist, General Magistrate, and the court would have occurred had they had appropriate information.

More importantly, Florida's statutory "goals" do not override federal constitutional *rights*. To the extent such goals do present some type of defense to Plaintiff's claims, those issues must be resolved on the merits, not on a motion to dismiss. *See Taylor*, 818 F.2d at 794 (child sufficiently pled cognizable liberty interest by alleging that gross negligence and deliberate indifference caused child's injuries; state's assertion of societal reasons for failing to take actions will be considered at later stages of proceeding).

D. Disputes About PSF's Knowledge and the Foreseeability of George Young's Conduct are Fact Disputes Not Resolvable on a Motion to Dismiss.

PSF's claim that it was not foreseeable that J.Y. was in danger of being sexually abused by her father are belied by the facts. Doc. 13 at pp.21-23. PSF was aware of George Young's lengthy and violent criminal history, which included drug charges, aggravated battery with a firearm, grand theft, robbery with a deadly weapon, felony battery, assault and domestic violence, and it never told either the General Magistrate, J.Y.'s therapist, or the court about this history. Doc. 1 at ¶ 15-23, 45-48, 53, 59, 67-69, 75-81. When placing J.Y. with George Young, Defendants knew that he had abandoned J.Y., she had never lived with him, that he used and abused drugs, and that there was a court order for J.Y. to have no contact with him. Defendants also knew that J.Y. had already been subjected to abuse and sexual battery by the caregivers Defendants placed her with, and those living with them, for

much of her young life. Yet Defendants failed to take any measures to ensure J.Y.'s safety and to ensure George Young was capable of caring for such a child.

Based on these allegations, Plaintiff has adequately pled that Defendants knowingly and recklessly placed J.Y. in danger and were deliberately indifferent to J.Y.'s safety and right to be free from harm. As such, Plaintiff has properly pled the § 1983 claim. *See H.A.L ex rel. Lewis v. Foltz*, 551 F.3d 1227, 1232 (11th Cir. 2008) (plaintiffs met pleading burden; issue was not whether Defendants actually knew or drew inference that plaintiffs were sexually abused, it was whether Defendants, who could have removed plaintiffs from home actually knew and were deliberately indifferent to substantial risk of plaintiffs being sexually abused); *Roes v. Fla. Dep't of Children & Family Servs.*, 176 F. Supp. 2d 1310 (S.D. Fla. 2001) (children bringing § 1983 suit against DCF and individual employees stated claim that constitutional rights violated by alleging that due to placement with abusive foster parents, they were deprived of right to be free from infliction of unnecessary pain and right to physical safety assured by fourteenth amendment).

Nonetheless, PSF argues that George Young's sexual battery on his child was unforeseeable due to a statutory provision that provides a "rebuttable presumption" of harm when a parent has been found guilty of various sexual crimes. Doc. 13 at pp.22-23. PSF erroneously contends that, absent such a conviction, it was not reasonably foreseeable that George Young would sexually batter J.Y. The lack of a

rebuttable presumption, however, does not operate to establish, *as a matter of law*, that it was unforeseeable George Young would sexually batter J.Y.

Instead, the foreseeability of George Young's abuse is a factual matter that cannot be resolved on a motion to dismiss and PSF cites no authority to the contrary. *See Page*, 493 Fed. App'x at 995 (fact disputes cannot be resolved on motion to dismiss); *Omar ex rel. Cannon v. Lindsey*, 243 F. Supp. 2d 1339 (M.D. Fla.) (fact issues in § 1983 case cannot be resolved on motion to dismiss), *aff'd*, 334 F.3d 1246 (11th Cir. 2003); *R.K. v. Kaufman*, No. 02-61534-CIV, 2007 WL 9698237, at *30 (S.D. Fla. Mar. 29, 2007) (denying motion to dismiss; jury could conclude that defendant exhibited deliberate indifference by canceling 24–hour supervision and that such decision was more than mere negligence or carelessness because since defendant knew full investigation of alleged abuse was not completed and two dangerous children remained in home); *Miracle by Miracle v. Spooner*, 978 F. Supp. 1161 (N.D. Ga. 1997) (genuine issues of fact as to whether caseworker exhibited deliberate indifference to welfare of children physically abused precluded summary judgment in § 1983 suit; reasonable jury could have found that caseworker left foster parents virtually unsupervised and unguided, failed to make required contacts, to return phone calls, or to report knowledge of at least one practice believed to constitute child abuse).

E. PSF's Conduct was Arbitrary and Conscience Shocking.

As PSF acknowledges, even if J.Y.'s situation was not somehow a "custodial" setting involving the deliberate indifference standard, it can still be liable for violating J.Y.'s constitutional rights by engaging in conduct that was arbitrary and conscience shocking. Doc. 31 at pp.10-11, 28-29. Defendants' conduct in this case falls within such a category. "[T]he conscience-shocking threshold is more quickly reached in cases where the victim is particularly vulnerable to abuse and is otherwise defenseless." *Hatfield v. O'Neill*, 534 Fed. App'x 838, 847 (11th Cir. 2013).

The inapposite *Doe* and *Sacramento* decisions that PSF cites do not suggest otherwise. In *Doe,* the plaintiff was a child who had been harmed by a boy the state placed in the child's home. The defendants were not liable there because it was not the victim who was under state custody and to whom the state owed a duty, it was the perpetrator. *Doe v. Braddy*, 673 F.3d 1313, 1318-19 (11th Cir. 2012). Here, of course, the victim was J.Y. who was in state custody throughout her life and to whom Defendants owed duties of protection. The *Sacramento* decision PSF cites is even more inapposite, as it involving split-second decisions made by police during a high-speed car chase. *Sacramento v. Lewis*, 523 U.S. 833 (1998).

III. PLAINTIFF'S NEGLIGENCE CLAIM IS ADEQUATELY PLED AND PSF'S MOTION TO DISMISS IT MUST BE DENIED.

PSF argues that Plaintiff's negligence claim against it in Count V should also be dismissed with prejudice because it had no duty to J.Y. after termination of

supervision. Doc. 13 at p.30. As set forth above, PSF had duties under state law to J.Y. throughout her life. The breach of those duties not only gives rise to a § 1983 claim, but at a minimum it subjects PSF to liability under Florida tort law. *See DeShaney*, 489 U.S. at 201–02 (recognizing that state's voluntary undertaking to protect child can constitute actionable negligence under state law); *Dep't of Health & Rehab. Servs. v. Yamuni*, 529 So. 2d 258 (Fla. 1988) (caseworker and DHS were negligent failing to adequately investigate and detect abuse of child which resulted in further abuse); *State, Dep't of Children & Family Servs. v. Amora*, 944 So. 2d 431 (Fla. 4th DCA 2006) (whether DCF's failure to adequately investigate possibility of physical abuse of child, to conduct home study, and to contact father before releasing child to mother's care was proximate cause of child's injuries by mother's boyfriend, was question for jury given evidence, among other things, that DCF protective investigator suspected child abuse, social worker was concerned about child being released to mother and communicated concerns to DCF before child's discharge, and DCF's attorney ordered investigation prior to child's release). Thus PSF's motion to dismiss Count V must be denied.

Furthermore, since Plaintiff's § 1983 claim is fully viable and must not be dismissed, and because Plaintiff has pending federal claims against the other Defendants in this action, there is no basis for this Court to decline to exercise its supplemental jurisdiction over the negligence claim, as PSF suggests (Doc. 13 at

p.31). *See* 28 U.S.C. § 1367(c)(3) (court may decline to exercise supplemental jurisdiction over state law claims if it has dismissed *all* claims over which it has original jurisdiction); *Perry v. Petco Animal Supplies Stores, Inc.*, No. 1:07-CV-2281-ODE-CCH, 2008 WL 11417088, at *6 (N.D. Ga. Mar. 27, 2008) (court to retain supplemental jurisdiction after dismissing one federal claim because two federal claims remained pending against other defendants and all claims arose out of same set of circumstances).

IV. AT A MINIMUM PLAINTIFF SHOULD BE PERMITTED TO AMEND THE COMPLAINT.

At a minimum, Plaintiff should be granted leave to amend the Complaint to plead additional facts if deemed necessary. PSF has not and cannot establish that there is no manner in which the claims can be amended to state a claim, as would justify a dismissal with prejudice. *See Woldeab v. Dekalb Cty. Bd. of Educ.*, 885 F.3d 1289, 1291 (11th Cir. 2018) (where more carefully drafted complaint might state claim, plaintiff must be given at least one chance to amend complaint before dismissal with prejudice, absent clear indication plaintiff does not want to amend complaint or more carefully drafted complaint could not state claim); Fed. R. Civ. P. 15 (courts should freely give leave to amend "when justice so requires").

V. CONCLUSION

Therefore, for the foregoing reasons Plaintiff respectfully requests that this Court deny PSF's Motion to Dismiss, or, at a minimum, that Plaintiff be permitted

to file an amended complaint, and that the Court enter such further orders and relief as it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify that this responsive memorandum consists of 6167 words and thus this filing is compliant with the 8,000 word limitation set forth under Rule 7.1(F), Fla. N.D. Local Rules.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2019, a true and correct copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will send an electronic notice of such filing to counsel for Defendants, and sent by e-mail delivery to all counsel of record.

/s/ Robert A. Rush
Attorney